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No. 92-600

Supreme Court, U.S.
FILED
NOV 9 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ADOPTIVE PARENTS OF M.N.M.,
Petitioners,

v.

M.J.L.,
Respondent.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

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RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Should a father be allowed to intervene in the adoption of his child when he attempts to intervene prior to expiration of the statute of limitations, and when, in violation of law, no attempt whatsoever was made to notify him of the adoption proceedings?

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The decision under review does not question generally the constitutionality of District of Columbia adoption laws or the one year statute of limitations which it contains. Rather, the challenged statute of limitations was found unconstitutional as appiled to the specific circumstances of this case. D.C. Code Ann. § 16-310 (Petitioner's Appendix 50a).

Petitioners seriously misstate the meaning and reach of the decision, which is quite narrow and limited to the unique facts of the case. Moreover, in affording a father a right to be heard in connection with the adoption of his child, the court below has not disturbed the underlying adoption.

This case involves a man, M.J.L., who, since the birth of his child—indeed, even before, from the time he learned of the pregnancy—has strenuously endeavored to assert his parental rights.

Before the birth of his child, he went to adoption agency counseling sessions in St. Louis with the birth mother, and expressed his desire to parent the child and his objection to an adoption. He alerted the hospital of his desire to parent the child and requested that he be notified of the child's birth. After the child was born, he filed paternity and custody actions in St. Louis. While that suit was pending, the mother, along with a District of Columbia adoption agency, initiated adoption proceedings in the District of Columbia.

District of Columbia law requires that "consent to a proposed adoption . . . is necessary . . . from both parents, if they are both alive . . .". D.C. Code Ann § 16-304(b)(2)(A), (Pet App. 48a) and that "due notice of pending adoption proceedings shall be given each person whose consent is necessary thereto, immediately upon filing a petition." D.C. Code Ann. § 16-306(a). (*Id.*)

Notwithstanding that the mother was obviously well aware of respondent's interest, he was not given notice. Pet. App. 14a-15a. Neither was there any legitimate reason for failing to give him notice. *Id.* The reasons asserted by the mother "for concealing the proceedings from appellant" were examined by the court below and found woefully inadequate. Pet. App. 15a. Thus, this is a case in which—despite the statutory and constitutional principle that a father is entitled to notice and a right to be heard before he may be stripped of his legal ties to his child—there were "conceded efforts" by "the mother and her parents, acquiesced in by the adoption agency to keep [respondent] in the dark." Pet. App. 13a.[1]

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[1] The record does not reveal whether the adopting parents had any complicity in these efforts to deprive respondent of the notice which was due him.

Upon learning of an adoption proceeding in the District of Columbia, respondent wrote to the court and asked to intervene. His request took a long time to reach the proper judge. He persisted in his efforts, and one year and forty-five days after the decree, finally succeeded in filing a formal motion to intervene.

Petitioner argued successfully to the trial court that the one year statute of limitations within which to challenge a final decree of adoption barred respondent from being heard. The trial court reasoned—and petitioners insist—that notwithstanding the deception practiced on the respondent, his submissions to the court within the one year period were not "regularly filed with the court" within the meaning of D.C. Code Ann. § 16-310. Although his continuous contacts included a submission that was "regularly filed," it came after the one year period. Therefore, respondent would not be given any opportunity to be heard.

The District of Columbia Court of Appeals reversed. It held simply that in no sense had respondent abandoned the child. His continued and repeatedly expressed interest required that he was entitled to have received the *statutory notice* which the law provides to him. Specifically, the court held that he had clearly grasped his opportunity and accepted "some measure of responsibility for the child's future," and thus could not be ignored when fundamental decisions, which would terminate his parental rights, were made by the courts. Pet. App. 10a-11a. Since he had a constitutional right to notice, the deception practiced upon him—indeed the plain "failure to notify [respondent] in disregard of the statute [and without excuse] would appear, without more, to violate his right to due process." Pet. App. 16a.

The court below held only that the respondent had a right to present his case. It did not reach the question as to how respondent's rights would affect the ultimate

disposition of the adoption proceedings—a proceeding which will focus on the best interest of the child:

> . . . many factors must be evaluated in deciding what disposition is best for this child, including the fact that [she] has lived with the adoptive parents for more than four years. We hold only that, assuming paternity, [respondent] must be accorded the opportunity to voice 'his opinion of where the child's best interest lie'. Citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983). Pet. App. 19a.

Contrary to the contentions of the petitioners, the court of appeals did not conclude that statutes of limitations are repugnant to the Constitution, nor did it extend the reach of *Lehr v. Robertson*, 463 U.S. 248 (1983), nor did it in any way rule that adoptions could never become final. Instead, the court of appeals granted limited relief to a father whose statutory right to notice of an adoption had been clearly and purposefully violated.

REASONS FOR DENYING THE WRIT

THIS CASE IS NOT WORTHY OF SUPREME COURT REVIEW

A. No New Rights for Fathers Have Been Created

Petitioners' hyperbole distorts the case under review. This case is an application of established legal principles to unique facts. The decision does not discuss the substantive rights of fathers, but merely reaffirms the modest procedural protections that must be afforded a man who zealously seeks to parent his child.

The petitioners admit, and the court of appeals ruled, that the notice provisions of the adoption statute had been clearly violated. The thrust of the court of appeals' opinion was that such purposeful violation of the statute—at least as respects a father that has actively pursued his interest in his child, and was thus entitled to constitutional protection—could not be tolerated. Any other

ruling would have meant that adoption agencies would be entitled to ignore statutory notice provisions—notice provisions that are constitutionally required—and thus reward misconduct and fraud.

The unsupported self-serving assertion by petitioners that "thousands" of adoptions will be affected by this decision (Pet. 4) totally misses the thrust of the holding. So long as adoption agencies and parents wishing to allow a child to be adopted are respectful of the interests of the other parent—where that parent has in turn shown an interest in the child—no adoptions will be overturned. To assume, as petitioners assume, that there are thousands of adoptions that will be affected is to assume that parents, agencies, and courts have been allowing the practices of concealment evidenced here. Even then, nothing in this case suggests that long-standing adoptions will be overturned, if such overturning is not in the child's best interest.

This was a case where respondent acted quickly to assert his interests. D.C. law was violated in circumstances which completely deprived a father of his opportunity to participate in the adoption of his child. Moreover, these circumstances included a mother who refused to disclose the father's identity, and an adoption agency which merely asserted, without more, that it was unable to locate or identify the father. The court of appeals properly rejected this as a basis for ignoring the clear requirements of District law:

> [Petitioners] do not contend that the adoption agency attempted to notify [the respondent] of the pending proceedings or that the trial court directed notice to him of the proceedings (or found that such notice would be futile). [Footnote omitted]. [Petitioners] also do not assert this to be a case in which fears about the safety of the child or other persons justified concealing the proposed adoption from the father. This court has not had occasion to decide whether extra-statutory concerns such as these might justify

> refusal to give a natural parent notice; we assume for present purposes that they may. But in view of the fundamental right at stake of a parent who has grasped his opportunity interest, [*Lehr v. Robertson*, 463 U.S. at 261], such concerns would surely have to be exceptional before an adoption could be approved without the parent having been contacted or given the opportunity to be heard on the matter. The reasons the mother gave here—and the adoption agency accepted—for concealing the proceedings from [respondent] fall well short of this exceptional showing; we do not understand [petitioners] to argue otherwise. Pet. App. at 14a-15a [Footnote omitted].

The court below was careful to affirm that there are circumstances where the failure to give notice would be excusable. This was not one of them. The D.C. Code clearly spells out how to proceed when a father (or mother) is unknown or unlocatable (D.C. Code Ann. § 304(d), (Pet. App. 49a)). These procedures were not followed. Although petitioners imply that the decision under review prevents adoptions from ever becoming final, this is far from the truth. The decision reveals that finality is a product of proper adherence to simple statutory directives.[2]

Allowing the trial court decision to stand, and thus forever preventing M.J.L. from voicing his opinion, does nothing to advance the legitimate purposes of D.C. adoption law, especially those provisions requiring notice. Indeed, the opposite is true. Only by enforcing those notice provisions is ordinary respect for law—and due process—assured.

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[2] The petitioners imply that the decision is contrary to the adoptive child's interests. However, the child's best interests were not before the court of appeals which stated:

> We express no opinion on the ultimate issue of whether the adoption entered by the trial court is in the best interests of the child. D.C. Code § 16-309(b)(3). (Pet. App. 2a)

B. There Is No Conflict in the Case Law

Petitioners cite five cases in an effort to prove that courts are rendering conflicting opinions on the issue presented. The five cases prove that there is no conflict. The five cases are from different states, and each represents a different set of facts applied to a different statute. These five cases are not so much concerned with the constitutionality of statutes of limitations, but with the enforcement of state adoption laws, especially those provisions addressing notice to parents.

Two of the five cases barred challenges to a final decree of adoption. In one case, *Syrovatka v. Erlich*, 608 F.2d 307 (8th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980), the parents knew about the relevant proceeding, knew about the adoption, and did not allege violations of statutory notice provisions. In any event, *after learning of the adoption*, the parents let 3 years go by before they challenged the adoption.

Walter v. August, 186 Cal. App. 2d 395; 8 Cal Rptr. 778 (1960) enforced a statute of limitations against parents who were clearly disinterested in the child and who waited over 5 years to challenge the adoption. But even *Walter* allowed that:

> It might be possible to imagine a case which could be of such character that a court would feel compelled to construe [a statute of limitation] as admitting of some exception . . . . *Id.* at 781. Citations omitted.

In any event, these two cases *preceded* this Court's decision in *Lehr* in which the due process interest of a father in his child was affirmed.

The three remaining cases are—as petitioners concede—fully consistent with the decision of the court below. In *In the Matter of Adoption of Lori Gay W.*, 589 P.2d 217 (Okla.), *cert. denied*, 441 U.S. 945 (1979), the court held that a statute of limitations could present a bar—but only if the statute was tolled until the parent learned of the entry of the adoption order. Pet. 18. The remain-

ing two cases, as petitioners concede, were cases in which final adoptions were disturbed. These two cases involved parents who were *not* provided with timely notice, *and* the lack of such timely notice was found to violate the adoption statute. *White v. Davis*, 163 Colo. 122, 428 P.2d 909 (1967); *In Re Adoption of Knipper*, 30 Ohio App. 3d 214, 507 N.E. 2d 436 (Ohio App. 1986).

These five cases display consistency not conflict. When parents know of an adoption and do nothing, they are not permitted to upset the adoption. When *notice* is improperly denied to a parent, relief is granted, notwithstanding any statute of limitations. It is hard to imagine, in any event, how three decisions, one in 1967, one in 1986, and one in 1992 can be described as a "trend". Pet. 19. These three cases stand for the proposition that state courts will not tolerate failure to provide required notice to parents.

Other decisions, not cited by petitioners, similarly demonstrate careful and consistent respect for the rights of a parent when a party fails to disclose critical information and such failure results in a denial of statutorily required notice. *Wade v. Geren*, 743 P.2d 1070 (Okla. 1987); *In Re Wildeboer*, 406 So. 2d 687 (La. App. 1981); *Summers v. Mylan*, 697 S.W. 2d 91 (Ark. 1985); *Kidder v. Hess*, 481 So. 2d 984 (Fla. App. 1986); *Sumter v. Allton*, 648 S.W. 2d 55 (Ark. 1983) (adoption decree set aside because father deprived of notice; fraud tolls statute of limitations); *Olney v. Gordon*, 402 S.W. 2d 651 (Ark. 1966).

Finally, petitioners also argue that the situation under review will continue to occur because mothers frequently refuse or are unable to provide the identity of the father. This is incorrect. The District of Columbia adoption code already provides for situations in which it can be proven that notice is impossible because a father is unknown or unlocatable. (D.C. Code Ann. § 16-304(d); 306(a)) Pet. App. 49a. As the court of appeals noted, these provisions were not utilized in this case.

The real argument that petitioners make is that all final decrees must forever be insulated from challenge, regardless of the facts and regardless of adherence to state law. This absolutist position has been consistently and properly rejected by state courts and the D.C. Court of Appeals. Given that fathers have rights too, *Lehr v. Robertson*, 463 U.S. 248 (1983), the purposeful failure to give notice to a father who has demonstrated his interest in the welfare of the child cannot be so easily ignored.

Cases involving adoption often involve strong emotions and difficult decisions. As will happen in this case, the ultimate resolution will reflect the unique facts of the case. Here, the issue of notice also involves unique facts. The result is not, in any sense, revolutionary. The court below applied clear precedent of this Court to those facts.

CONCLUSION

For the foregoing reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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